Ralphs Grocery Company and United Food and Commercial Workers Union, Local No. 135, and United Food and Commercial Workers Union, Local No. 324 and United Food and Commercial Workers Union, Local No. 770 and United Food and Commercial Workers Union, Local No. 1036 and United Food and Commercial Workers Union, Local No. 1167 and United Food and Commercial Workers Union, Local No. 1428 and United Food and Commercial Workers Union, Local No. 1442. Cases 31–CA–27160, 31–CA–27475, and 31–CA–2768

## February 19, 2008 DECISION AND ORDER

## BY MEMBERS LIEBMAN AND SCHAUMBER

On June 14, 2007, Administrative Law Judge Lana H. Parke issued the attached decision. The Respondent filed exceptions and a supporting brief; the General Counsel filed a brief answering the exceptions; the Charging Party Unions filed cross-exceptions and a brief supporting the cross-exceptions and answering the exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions as modified<sup>3</sup> and to adopt the recommended Order<sup>4</sup> as modified and set forth in full below.<sup>5</sup>

<sup>1</sup> Local 135 was a charging party in Cases 31–CA–27160 and 31–CA–27685, but was not a charging party in Case 31–CA–27475.

In finding that the Respondent violated Sec. 8(a)(5) by failing to furnish the requested information, the judge rejected the Respondent's contention that the Unions' sole purpose in pressing its information requests was to support unfair labor practice charges. The judge reasoned that "no nexus exists between the information requested and the evidence necessary to support the charges," and, therefore, that the Unions "could not, logically, have sought the information at issue in order to bolster their ULP charges." In adopting the judge's rejection of the Respondent's contention, we rely solely upon the fact that the Respondent does not except to or otherwise challenge these findings.

<sup>3</sup> In order to clarify the violations found, we shall set forth Amended Conclusions of Law.

The Unions' Request for Audit Information

The Respondent and the Unions were parties to successive collective-bargaining contracts, the most recent of which expired on October 5, 2003. During negotiations for a new contract, the Respondent locked out the 19,000 bargaining unit employees from October 12, 2003, through February 26, 2004, when the parties reached agreement on a new contract. During the lock-out, the Respondent continued operations and hired temporary replacements. It also rehired several hundred unit employees under false identities—that is, using false names and social security numbers.

Sometime before September 2004 the U.S. Attorney began investigating allegations regarding the Respondent's rehiring of unit employees under false identities. Shortly thereafter, the Respondent directed a law firm to conduct an audit regarding the Respondent's hiring practices during the lockout. On December 14, 2004, June 6, and October 25, 2005, the Unions requested that the Respondent provide the Unions with the audit information. The Respondent refused to provide the audit information, contending that the information was within the attorney-client and attorney work-product privileges.

The judge found that the Respondent violated Section 8(a)(5) by refusing to provide the audit information and ordered the Respondent to provide it. The judge, however, stated that the Respondent could litigate its privilege contentions in compliance. In their respective exceptions, the Respondent and the Unions contend, among other things, that the judge erred in deferring to compliance litigation of the privilege contentions. The Respondent contends that the audit information falls within the privileges and the Unions contend that it does not.

We find that the Respondent timely raised its privilege contentions and that the parties had an adequate opportunity to litigate issues relating to those contentions. We discern no reason why these issues are better suited to resolution at the compliance stage. Accordingly, the judge erred in deferring to compliance litigation and resolution of the Respondent's privilege contentions.

The attorney work-product privilege applies to documents prepared by a party or his representative in anticipation of litigation. See *Central Telephone Co. of Texas*, 343 NLRB 987, 988 (2004). Here, the U.S. Attorney's Office had undertaken an investigation of the Respon-

Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Members Liebman and Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

<sup>&</sup>lt;sup>2</sup> We reverse the judge's finding that the social security numbers requested by the Unions were presumptively relevant. See *Bookbinder's Seafood House, Inc.*, 341 NLRB 14, 15 fn. 1 (2004) (employee social security numbers are not presumptively relevant to a union's performance of its obligations as bargaining representative). However, we note that the Respondent used social security numbers in maintaining its personnel records, and that this information was relevant to the Unions' investigation of its discrimination grievance. Accordingly, we affirm the judge's finding that the Respondent was required to provide the requested information.

<sup>&</sup>lt;sup>4</sup> We shall modify the judge's recommended Order and substitute a new notice to conform to the violations found and to include the Board's standard remedial language.

<sup>&</sup>lt;sup>5</sup> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman,

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dent's hiring practices during the lockout. The Respondent was aware of the investigation, and its attorney prepared the audit information at the request of the Respondent. Therefore, the audit information was within the attorney work-product privilege.<sup>6</sup>

The General Counsel and the Unions contend that the Respondent waived the attorney work-product privilege. In support, they cite a document titled "Limited Waiver of Attorney-Client Privilege and Protections of Attorney Work Product Doctrine" that the Respondent executed in a federal criminal proceeding. However, as the judge noted, the Limited Waiver document, by its terms, applies only to "material requested or inquired into by the [U.S. Attorney]," and there is no evidence that the audit information was requested or inquired into by the U.S. Attorney. Accordingly, the record does not demonstrate that the Respondent waived the attorney work-product privilege regarding the audit information.

Having concluded that the requested audit information is within the attorney work-product privilege, we then balance the Respondent's confidentiality interests against the Unions' need for the requested information in determining whether the Act requires its disclosure. See BP Exploration, supra, 337 NLRB at 888; Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979). Here, the Respondent has a strong confidentiality interest in material falling within the attorney work-product privilege. Central Telephone, supra, 343 NLRB at 990; BP Exploration, supra, 337 NLRB at 889. Further, to the extent that the requested audit information addresses the Respondent's hiring of bargaining unit employees during the lockout, it contains information that our Order requires the Respondent to provide in response to the Unions' other information requests. Accordingly, we find that a balancing of the competing interests supports nondisclosure of the audit information. Similarly, we find that the Respondent is not obligated to provide a summary of the audit information where our Order already requires the Respondent to provide information relevant to the hiring of unit employees during the lockout.

For these reasons, we find that the Respondent did not violate Section 8(a)(5) by refusing to disclose the audit information.

#### AMENDED CONCLUSIONS OF LAW

- 1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. Each of the Charging Party Unions is a labor organization within the meaning of Section 2(5) of the Act.
- 3. The Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the Charging Party Unions with the following relevant information.
- (a) For each employee who worked under a false name or social security number during the 2003–2004 lockout, the employee's true name and social security number, the false name and social security number, the dates employed under a false identity, the positions in which the employee worked during the lockout, the employee's straight-time rates of pay during the lockout, and the store numbers at which such employment took place.
- (b) A description of all documents provided by employees in response to the September 13 and October 1, 2004 letters from Respondent Vice President Mary M. Kasper that related to work by employees under false identities or employee refusals to work under false identities, complete photocopies of such documents, or a written proposal denoting a specific time and place for the inspection and copying of such documents.
- (c) The names and titles of all of the Respondent's employees or representatives who communicated in writing with bargaining unit employees concerning the information requested in the Kasper letters, the dates of all such communications, and if such communications were written, a description of the documents in detail, as well as complete photocopies, or a written proposal denoting a specific time and place for the inspection and copying of such documents.
- 4. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.
- 5. The Respondent has not violated the Act in any other manner except as specifically found herein.

#### **ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth below and orders that the Respondent, Ralphs Grocery Company, Los Angeles, California, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Refusing to provide the Charging Party Unions with the requested information described herein that is

<sup>&</sup>lt;sup>6</sup> The attorney-client privilege principally applies to attorney-client communications. See *BP Exploration (Alaska), Inc.*, 337 NLRB 887, 888–889, 893–894 (2002). We find it unnecessary to reach the issue of whether the audit information was within the attorney-client privilege. See *Central Telephone*, supra, 343 NLRB at 990 fn. 7.

<sup>&</sup>lt;sup>7</sup> We find no merit to the General Counsel's assertion that the Respondent, in claiming that the audit information was privileged, "never... attempted to negotiate an accommodation." The record shows that the Respondent offered to discuss the issues raised by the information requests, that the Respondent and the Unions each told the other on several occasions that they were willing to meet, and that at least one meeting was tentatively scheduled. The Unions canceled the meeting because the Respondent had not provided any of the requested information.

relevant and necessary to their responsibilities as exclusive collective-bargaining representatives of the Respondent's employees.

- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days from the date of this Order, provide the Charging Party Unions with the information requested by them and described herein, including information relating to the Respondent's hiring of bargaining unit employees under false names during the 2003–2004 lockout.
- (b) Within 14 days after service by the Region, post at its facilities throughout California copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that the Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the closed facilities at any time after December 23, 2004.
- (c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

## **APPENDIX**

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

## FEDERAL LAW GIVE YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf.

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to provide your collectivebargaining representative with requested information that is relevant and necessary to its responsibilities as your collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL provide your collective-bargaining representative with the information requested by it relating to our hiring of bargaining unit employees under false identities during the 2003–2004 lockout.

## RALPHS GROCERY CO.

Rudy L. Fong-Sandoval, Atty., for the General Counsel.

Timothy F. Ryan, Atty. (Morrison & Foerster, LLP), of Los Angeles, California, for the Respondent.

Laurence D. Steinsapir and Susan M. Swan, Attys. (Schwartz, Steinsapir, Dohrmann & Sommers LLP), of Los Angeles, California, for the Charging Parties.

Jeffrey S. Wohlner, Atty. (Kohlner, Kaplon, Phillips, Young & Cutler), of Los Angeles, California, for Charging Parties, Locals 324 and 1167.

## DECISION

## STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. This matter was tried in Los Angeles, California, on February 27, 2007, upon an order consolidating cases, consolidated complaint, and notice of hearing (the complaint) issued December 20, 2006,¹ by the Acting Regional Director for Region 31 of the National Labor Relations Board (the Board) based upon charges filed by the above-named Locals of the United Food and Commercial Workers Union (collectively the Charging Parties and individually Local plus respective number). The complaint alleges Ralphs' Grocery Company (the Respondent) violated Sections 8(a)(1) and (5) of the National Labor Relations Act (the Act). The Respondent essentially denied all allegations of unlawful conduct.

<sup>8</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>&</sup>lt;sup>1</sup> All dates herein are 2005, unless otherwise specified.

No oral testimony was presented; the record consists of a Joint Stipulation of Facts and certain documents<sup>2</sup> introduced into evidence by the Charging Parties.<sup>3</sup>

#### Issue

Whether the Respondent failed and refused to bargain collectively with the Charging Parties as the exclusive collective-bargaining representatives of its employees by failing and refusing to furnish the Charging Parties with requested information necessary for, and relevant to, the Charging Parties' performance of its collective-bargaining duties.

#### Jurisdiction

At all relevant times, the Respondent, a corporation with an office and places of business throughout California (the Facilities), and a subsidiary of the Kroger Company, the headquarters of which are in Cincinnati, Ohio, has been engaged in the operation of retail grocery markets. The Respondent annually derives gross revenues in excess of \$500,000 from its business operations and purchases and receives at the Facilities goods or services valued in excess of \$50,000, directly from points outside the State of California. Respondent admits, and I find, it has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Charging Parties are labor organizations within the meaning of Section 2(5) of the Act.

## FINDINGS OF FACT

## A. The 2003—2004 Labor Dispute

The Respondent and the Charging Parties have been signatory to successive collective-bargaining agreements for decades, the penultimate of which was effective by its terms from October 4, 1999, through October 5, 2003 (the 1999–2003 Agreement), and covered a unit of numerous employee classifications described in article 1, section A, paragraph 1 and appendices "A" through "H" of the 1999–2003 Agreement (the unit).

In the course of negotiations between the Charging Parties and the Respondent for a collective-bargaining agreement to succeed the 1999–2003 Agreement, the Respondent, beginning October 12, 2003, locked out more than 19,000 bargaining unit employees from about 325 of its grocery markets. Thereafter,

the Respondent allegedly surreptitiously rehired more than 1000 bargaining unit employees (the lockout hirings), requiring the employees to work under false identities and falsifying relevant governmental and union employment reports. On February 26, 2004, the Respondent and the Charging Parties agreed upon the terms of a new collective-bargaining agreement (the 2004–2007 Agreement) and unit employees returned to work.

# B. The Kasper Letters and the Respondent's Internal Investigation/Audit

During September and October 2004, the Respondent sent mailings to certain unit employees over the signature of Mary M. Kasper, Respondent's vice president and senior counsel (the Kasper letters), containing the following communications:

Letter of September 13, 2004. The Respondent notified the employee addressees of an investigation by the United States Attorney's into false payroll reports generated during the 2003–2004 labor dispute. The Respondent assured the addressees that no disciplinary actions would be taken against them for working during the lockout under inaccurate names and/or social security numbers and requested them voluntarily to complete and return an enclosed questionnaire providing correct personnel information, which might be furnished to governmental agencies.

Letter of October 1, 2004. The Respondent sent a second request to the addressees of the September 13, 2004 letter, limiting the previous questionnaire request to employees who worked during the labor dispute under another's or fictitious personnel information. The Respondent informed the addressees that the information they furnished, "although confidential," would be provided to the government.

Investigation and Audit. The Respondent conducted an internal investigation/audit (the audit) of the Lockout Hirings. No specifics of the contents of the audit were adduced at the hearing; by letter of June 22, the Respondent informed the Charging Parties that the audit had not been completed and that no final investigative report had been prepared.

## C. Indictment of the Respondent and Guilty Plea

On December 15, 2005, a Federal grand jury in Los Angeles indicted the Respondent for, inter alia, false representation of social security numbers and false employment reporting. On July 26, 2006, the Respondent, by Mary M. Kasper (M. Kasper), vice president of legal services, pled guilty to the following felony counts: conspiracy, use of false social security numbers, identity fraud, falsifying and concealing material facts in matters within the jurisdiction of the Internal Revenue Service and the Social Security Administration, and concealment of facts from an employee benefit plan. Under the terms of its plea agreement, the Respondent paid a criminal fine and a restitution sum that included reimbursement to the Charging Parties for financial assistance given to the employees during the labor dispute. Further, any officer and/or agent of the Respondent owing fiduciary duty to any employee benefit funds was required to participate in a fiduciary training and compliance program.

<sup>&</sup>lt;sup>2</sup> CP Exhs. 3 and 4 were received into evidence posthearing. They are, respectively, attachments to the Respondent's June 2006 plea agreement pursuant to the June 2004 grand jury indictment of the Respondent: Statement of facts and limited waiver of attorney/client privilege and protections of attorney work-product doctrine. The Charging Parties' posthearing motion for reconsideration of the ruling rejecting CP Exhs. 1, 2, and 6 is hereby denied.

<sup>&</sup>lt;sup>3</sup> The parties agreed to change references to "the Unions" in the joint stipulation of facts to the Charging Parties. The Charging Parties sought to add to the statement of central issue in the joint stipulation (p. 10) the following: "and whether or not the Respondent violated the Act in any other manner," which request has been denied by separate written ruling. Posthearing, the Charging Parties moved for reconsideration of said ruling. For the reasons set forth in the original ruling, the request for reconsideration is denied.

<sup>&</sup>lt;sup>4</sup> Where not otherwise explained, the findings of fact herein are based on party admissions, the joint stipulation of facts, and the CP Exhs. 3 and 4.

- D. The Charging Parties' Information Requests and Respondent's Responses<sup>5</sup>
- 1. The Charging Parties' December 14, 2004 information request

By letter dated December 14, 2004, the Charging Parties requested the Respondent provide, inter alia the following: (1) names, employee numbers, store numbers and store addresses of all current and former bargaining unit employees who provided information in response to the Kasper letters; (2) for each employee who provided information in response to the Kasper letters, the information provided, including real names and social security numbers, false names and social security numbers, dates employed under a false identity, store numbers at which such employment took place, and a description of all documents; (3) copies of any documents or records provided in response to the Kasper letters; and (4) a detailed explanation of the scope of the Respondent's internal investigation and audit of work performed by employees during the lockout and its findings

By letter dated December 23, 2004, the Respondent refused the Charging Parties' December 14, 2004 request on grounds that the information sought was not presumptively relevant to the bargaining relationship between the parties and raised confidentiality, privacy, and, with regard to the Audit, attorney/client and attorney work product privilege concerns.

By letter dated December 29, 2004, the Charging Parties expressed their willingness to meet and discuss the Respondent's confidentiality concerns and asserted, inter alia:

The information we seek is in fact directly relevant to the enforcement of various aspects of the collective-bargaining agreement . . . . Moreover, the requested information is needed to pursue unfair labor practice charges before the Board.

By letter dated January 11, the Respondent again requested that the Charging Parties explicate the relevance of the requested information so the Respondent could determine its obligations, if any, to respond.

The Respondent furnished no information to the Charging Parties pursuant to the Charging Parties' December 14, 2004 request.

## 2. The Charging Parties' May 12 grievance

On May 12, 2005, the Charging Parties filed a grievance against the Respondent in accordance with the 2005–2007 Agreement alleging that since the lockout ended, "Ralphs . . . [has] discriminated against locked-out workers in favor of workers who agreed to work during the lock-out with respect to various terms and conditions of employment . . ." (the grievance).

By letter dated May 26, the Respondent notified the Charging Parties that it considered the grievance defective because it did not give "written notice setting forth the *exact* nature of the grievance."

3. The Charging Parties' June 2005 Information Requests

By letter dated June 6, the Charging Parties further explicated the basis of the grievance and requested information, as follows:

Our grievance includes, but is not limited to, the following conduct by Ralphs:

- (a) Retaliation against bargaining unit employees who provided information about Ralphs' potential criminal conduct or who refused to work during the lockout.
- (b) Favorable treatment for employees who worked during the lockout.
- (c) Retaliation or favorable treatment arising in connection with bargaining unit members' responses to [the Kasper letters].

To assist the local unions in their investigation of this grievance, we request . . . the following information:

- (2) [sic] For each employee who worked under a false name or Social Security number, the employee's true name and Social Security number, the false name and Social Security number, the dates employed under a false identity, the positions in which the employee worked during the lockout, the employee's straight-time rates of pay during the lockout, and the store numbers at which such employment took place.
- (3) A description of all documents provided in response to [the Kasper letters] that relate to work by employees under false identities or employee refusals to work under false identities. Alternatively, please provide complete photocopies, or . . . arrange a mutually-convenient time and place for their inspection and copying.
- (4) The names and titles of all Ralphs' employees or representatives who communicated in writing with bargaining unit members concerning the information requested in [the Kasper letters], and the dates of all such communications. If such communications were written, please describe the documents in detail, provide complete photocopies, or . . . arrange a mutually-convenient time and place for their inspection and copying.
- (5) . . . a complete copy of [the internal investigation and audit of work performed by employees during the lockout] with all attachments or . . . arrange a mutually-convenient time and place for the inspection and copying.

By letter dated June 22, the Respondent informed the Charging Parties that it would not provide the requested information because the grievance failed to meet specificity requirements (i.e., dates, locations, employees involved, social security numbers, incidents pertaining to the grievance, terms of employment, specific transfers and hours of work) and the information sought was not presumptively relevant and was confidential. Regarding the Charging Parties' request for a copy of the "investigation," the Respondent declined to produce any documents generated during the continuing investigation, as they

<sup>&</sup>lt;sup>5</sup> As the parties concede the communications detailed herein were sent and/or received by authorized communicants, I have not identified specific addressors/addressees.

<sup>&</sup>lt;sup>6</sup> Perhaps inadvertently, the May 12 grievance cover letter did not list Local 135 as one of the grieving locals.

were protected by attorney/client and attorney work product privileges.

The Respondent furnished no information to the Charging Parties pursuant to the Charging Parties' May and June 2005 requests. In the ensuing months, the Charging Parties declined to meet with the Respondent to discuss the grievance because the requested information had not been furnished.

4. The Charging Parties' October 2005 information request

By letter dated October 25, the Charging Parties renewed and repeated their June 6 request for information, explaining each item's relevance to the Charging Parties' investigation and processing of the grievance, as follows:

1. For each employee who worked under a false name or Social Security number, the employee's true name and Social Security number, the false name and Social Security number, the dates employed under a false identity, the positions in which the employee worked during the lockout, the employee's straight-time rates of pay during the lockout, and the store numbers at which such employment took place.

*Relevance:* This information is presumptively relevant, as it pertains to the identities and and terms and conditions of bargaining unit members. Moreover, it is directly relevant to the Grievance, as it pertains to the identities of employees who worked at Ralphs during the lockout.

2. A description of all documents provided in response to [the Kasper letters] that relate to work by employees under false identities or employee refusals to work under false identities. Alternatively, please provide complete photocopies, or . . . arrange a mutually-convenient time and place for their inspection and copying.

Relevance: This information, too, is presumptively relevant. The requested information concerns employee responses to [the Kasper letters] . . . . Moreover, the information is directly relevant to the Grievance, and is necessary for the Local Unions' investigation and evaluation of the Grievance [which] concerns Ralphs' discrimination with respect to whether employees worked at Ralphs during the lockout. As this is precisely what Ms. Kasper inquired of in her letters, the information contained in employee responses is immediately relevant to the Grievance. The Grievance also concerns Ralphs' discrimination on the basis of bargaining unit employees' responses to the Kasper letters. For this reason, too, copies of employee responses to Ms. Kasper's correspondence are immediately relevant to the Unions' investigation and evaluation of the Grievance.

3. The names and titles of all Ralphs' employees or representatives who communicated in writing with bargaining unit members concerning the information requested in [the Kasper letters], and the dates of all such communications. If such communications were written, please describe the documents in detail, provide complete photocopies, or . . . arrange a mutually-convenient time and place for their inspection and copying.

Relevance: This information is also directly relevant to the Local Unions' ability to effectively police the Collective Bar-

gaining Agreement. As with request two, above, this request is directly relevant to the Grievance as it concerns discrimination on the basis of employees' response to the Kasper letter. In order to fully investigate and evaluation this aspect of the Grievance, the Local Unions obviously require copies of all communications between bargaining unit employees and Company representatives. Moreover, the information is relevant as it pertains to the identities of witnesses with knowledge of the facts at issue in the Grievance.

4. [The Kasper letters], as well as other correspondence from Ralphs, indicates that Ralphs is conducting an internal investigation and/or audit of work performed by Ralphs employees during the lockout, under either false identities of their own names, as well as of Ralphs' employment of Albertsons and Vons employees during the lockout. We request a complete copy of the investigation with all attachments, or, if the investigation is still ongoing a complete copy of all existing drafts, attachments, and evidence used in conducting and/or preparing the investigation. If Ralphs claims that its investigation(s) are privileged under the attorney-client or attorney work-product privileges, we alternately request that Ralphs furnish a complete summary of the investigation and factual findings. Alternately, please propose in writing a specific time and place for our inspection and copying of such documents.

Relevance: This information is also directly relevant to the Local Unions' ability to effectively police the Collective Bargaining Agreement. Essential to the Local Unions' investigation and evaluation of the Grievance is complete information of the identities of the employees against and in favor of whom Ralphs is now discriminating. The full picture of Ralphs' lockout recall of bargaining unit employees is still unknown to the Local Unions, and the Local Unions do not have complete information regarding the employees who worked during the entire recall, worked during portions of the recall, and/or were solicited, but declined, to work during the recall. For this reason, Ralphs' investigation of the matter is of immediate relevance.

The Respondent did not respond to the Charging Parties' October 25 letter and furnished none of the requested information.

## Discussion

## A. Positions of the Parties

The General Counsel and the Charging Parties contend that the information sought by the Charging Parties is presumptively relevant to the Charging Parties' obligation to represent unit employees and to administer and police an existing collective-bargaining agreement.

The Respondent, while recognizing its obligation to provide relevant information to unions representing its employees, argues that the Charging Parties have no right to the information they seek in this instance. The Respondent contends that the Charging Parties have not met their burden of establishing the relevance of the information sought, that the Charging Parties seek the information for the improper purpose of pursuing pending unfair labor practice charges, that the Charging Parties manufactured a grievance to provide an otherwise factitious

basis for the requested information, and that some of the information requested was protected by the attorney/client privilege.

B. The Charging Parties' Requests for Information and the Respondent's Refusals

No party disputes the existence of a "general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties." NLRB v. Acme Industrial Co., 385 U.S. 432, 435–436 (1967). This obligation extends to information in furtherance of, or which would allow the union to decide whether to process, a grievance. Id. at 436; Bickerstaff Clay Products, 266 NLRB 983 (1983). Information pertaining to employees within the bargaining unit is presumptively relevant to a union's representational duties, including that necessary to decide whether to proceed with a grievance or arbitration. Thus, employee personnel information, job descriptions, pay-related data, employee benefits, and policies that relate thereto are all presumptively relevant, as is similar information regarding employee hires, including strike replacements. Bargaining representatives are not required to make a specific showing of the relevance of requested information unless the employer has rebutted the presumption of such. Presumptively relevant information must be furnished on request to employees' collectivebargaining representatives unless the employer establishes legitimate affirmative defenses to the production of the information. Golden Crest, 349 NLRB No. 37 (2007) (not reported in Board volumes); Metta Electric, 349 NLRB 1088 (2007); Finch, Pruyn & Co., 349 NLRB 270, 277 fn. 28 (2007); Southern California Gas Co., 346 NLRB 449 (2006); Beverly Health & Rehabilitation Services, 346 NLRB 1319, 1326 (2006); River Oak Center for Children, 345 NLRB 1335, 1336 (2005); Postal Service, 332 NLRB 635 (2000); Mathews Readymix, Inc., 324 NLRB 1005, 1009 (1997), enfd. in relevant part 165 F.3d 74 (D.C. Cir. 1999).

In situations where a collective-bargaining representative must demonstrate the relevance of the requested information to its representational duties, the burden is not severe. The relevance standard is a liberal, "discovery-type standard." NLRB v. Acme Industrial Co., supra at 437; Southern California Gas Co., supra (2006); Quality Building Contractors, 342 NLRB 429, 430 (2004). Accordingly, information that is "potentially relevant and will be of use to the union in fulfilling its responsibilities as the employees' exclusive bargaining representative" must be produced. Pennsylvania Power & Light Co., 301 NLRB 1104, 1104-1105 (1991). The requested information need not be dispositive of the issue for which it is sought but need only have some bearing on it. Id. at 1105. "An employer must furnish information that is of even probable or potential relevance to the union's duties." Conrock Co., 263 NLRB 1293, 1294 (1982).

The Respondent contends that the requested information bears no relationship to any mandatory subject of bargaining, as the information sought concerns events that occurred during the hiatus between the 1999–2003 Agreement and the 2004–2007 Agreement. A union's collective-bargaining relationship with employees to whom it owes a representational duty is not defined by the existence of a collective-bargaining agreement; the

relationship is as viable in the absence of a labor contract as during its term. The information sought herein relates to mandatory subjects and is presumptively relevant. A finding that the requested information is presumptively relevant resolves the Respondent's further objection that the Charging Parties did not adequately explain the relevance of the requested information. As noted above, a union may rely upon a presumption of the relevance of information pertaining to employees within the bargaining unit and has no obligation to otherwise explain its significance. Inasmuch as the Charging Parties were not obliged to explain the relevance of the information they sought, any asserted deficiencies thereof are immaterial. See Quality Building Contractors, supra, quoting Commonwealth Communications, 335 NLRB 765, 768 (2001): "When a union seeks information pertaining to employees within a bargaining unit. the information is presumptively relevant to the union's representational duties, and the General Counsel may establish a violation for the employer's failure to furnish it without any further showing of relevancy."

The Respondent also argues that the Charging Parties were not entitled to the requested information because they sought it for an improper purpose, i.e., to pursue unfair labor practice charges before the Board. Because the Board's procedures do not include pretrial discovery, the Board has found refusals to furnish information lawful where information requests relate to pending charges. *Saginaw Control & Engineering, Inc.*, 339 NLRB 541, 543–544 (2003). If the request's timing and the information's relationship to the charges show the union sought the information in order to bolster its charges, the Board will not find a refusal to provide the information unlawful. See *Pepsi-Cola*, 315 NLRB 882 (1994).

In their December 29, 2004 letter, the Charging Parties stated a twofold purpose in requesting information from the Respondent: to enforce the collective-bargaining agreement and to pursue unfair labor practice (ULP) charges before the Board. On January 12, the Charging Parties filed with the Board the first of the ULP charges herein (Case 31-CA-27160), which alleged the Respondent had violated Section 8(a)(1) and (5) of the Act by "failing to provide information reasonably necessary for collective-bargaining, the investigation of grievances, and fulfilling other statutory responsibilities of a collective-bargaining representative." Succeeding ULP charges filed on August 18 (Case 31-CA-27475) and January 26, 2006 (Case 31–CA–27685), respectively, repeated the same allegations. While the close proximity of the first information request to the first ULP filing (about 2 weeks) superficially suggests a linkage, the substance of all the charges negates any such conclusion. The Charging Parties could not, logically, have sought the information at issue in order to bolster their ULP charges that the Respondent had refused to supply the information; no nexus exists between the information requested and the evidence necessary to support the charges. Consequently, the Respondent has failed to demonstrate that the Charging Parties sought the information for an improper purpose.

 $<sup>^7</sup>$  The Region inadvertently stated the filing date on Case 31–CA–27685 as "01/26/05."

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When, on May 12, the Charging Parties filed a grievance against the Respondent alleging discrimination against lockedout workers in favor of workers who agreed to work during the lock-out, the Charging Parties established an additional need for the information they sought. Although the Respondent argues the grievance was filed solely to mask the Charging Parties' true and improper motive for requesting the information, there is no evidence the Charging Parties were not, in fact, legitimately concerned about the impact of the Respondent's felonious conduct on terms and conditions of unit employees' employment. Indeed, it is reasonable to expect that any conscientious representative would seek full disclosure of the circumstances surrounding the Respondent's criminal acts. Even assuming the Charging Parties had more than one motive in requesting the information, "it is well established that, where a union's request for information is for a proper and legitimate purpose, it cannot make any difference that there may be other reasons for the request or that the data may be put to other uses." Associated General Contractors of California, 242 NLRB 891, 894 (1979). When the information requested is presumptively relevant, "it is well settled that the presumption of relevance is not rebutted by a showing that the union also seeks the information for a purpose unrelated to its representative function." Coca-Cola Bottling Co., 311 NLRB 424, 425 (1993). The Respondent's further argument that the grievance was defective in not providing specific instances or details of discriminatory acts giving rise to the grievance likewise fails. The Respondent offers no authority for the proposition that a grievance must detail the provenance of the conduct grieved. but only urges that an inference should be drawn from the generality of the grievance that its purpose is improper. For reasons stated, I decline to infer an improper purpose and find the information sought, relating as it does to unit employees' terms and conditions of employment, presumptively relevant.8

The Respondent contends that some of the information requested by the Union is protected by the attorney/client privilege, specifically documents generated by the Respondent's outside counsel pursuant to the audit. The General Counsel asserts the Respondent has not established that any documents or reports comprising the audit were privileged and argues that even assuming any portion of the audit met privilege requirements, the privilege was waived by the Respondent's execution of the Waiver of Privileges in the course of the federal indictment proceedings (the waiver). The waiver is titled "Limited Waiver of Attorney-Client Privilege and Protections of Attorney Work-Product Doctrine." It specifies that the waiver applies to "communications requested or inquired into by the [United States Attorney]" and provides that the Waiver "(a) [i]s effective only in the Criminal Investigation and in any criminal prosecutions that may arise from or relate to the Criminal Investigation; and (b) [d]oes not bind, and is not enforceable against, RALPHS in any judicial, legislative, administrative, or regulatory proceedings arising therefrom or relating thereto."

Once waived, the attorney/client privilege is lost in all forums for proceedings running concurrent with or after the waiver occurs. Wal-Mart Stores, Inc., 348 NLRB 833, 834 (2006), citing Genentech, Inc. v. U.S. International Trade Commission, 122 F.3d 1409, 1416–1417 (Fed. Cir. 1997) (waiver in district court proceeding operated as a waiver in concurrent International Trade Commission proceeding). However, neither the General Counsel nor the Charging Parties have cited any authority for the proposition that a limited waiver of specified documents constitutes a waiver of entirely different documents, even those arising from the same factual circumstances. It may be that some documents included in the audit are covered by the waiver, but, as the Respondent points out, "[t]here is no evidence in the record . . . that the information requested by the Union was 'requested or inquired into by the [U.S. Attorney]."

It appears that the audit addressed information relating to the Respondent's hiring during the lockout. Such information is, for the reasons already stated, presumptively relevant, and the Respondent is therefore obligated either to produce the audit or to provide the Union with a legitimate explanation for its refusal. See *U.S. Postal Service*, 332 NLRB 635, 636 (2000). The "strong confidentiality interest with respect to a communication that is subject to the attorney/client privilege, which generally protects from disclosure confidential communications between attorneys and their clients for the purpose of obtaining or providing legal advice" would constitute a legitimate explanation and preclude the furnishing of such communications. See *BP Exploration (Alaska), Inc.*, 337 NLRB 887, 889 (2002).

The contents of the audit are not expressly known, and no evidence has been adduced to demonstrate whether any of the documents and/or information comprising the audit fit within the attorney/client privilege. However, it does not follow that the Charging Parties are stymied in obtaining such portions of the audit as fall outside the privilege. Any dispute as to the privileged nature of the information encompassed by the audit may be raised and litigated in compliance. See *Earthgrains Co.*, 349 NLRB 389 fn. 1 (2007).

Accordingly, by refusing to provide the Charging Parties with the requested information described herein, the Respondent has violated Section 8(a)(1) and (5) of the Act.<sup>9</sup>

## CONCLUSIONS OF LAW

- 1. The Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
- 2. Each of the Charging Parties is a labor organization within the meaning of Section 2(5) of the Act.
- 3. The Respondent violated Section 8(a)(1) and (5) of the Act by failing to provide the Charging Parties with the following relevant information:

<sup>&</sup>lt;sup>8</sup> Because I have found the information sought by the Charging Parties is presumptively relevant, it is unnecessary to address the Respondent's contention that the Charging Parties improperly placed conditions on proposed negotiations over the information requests.

<sup>&</sup>lt;sup>9</sup> It is unnecessary to distinguish among the various requests for information. By their information request of October 25, 2005, the Charging Parties particularized all information sought. An order requiring the Respondent to furnish the information forthwith remedies each of the Respondent's unlawful refusals to provide information.

For each employee who worked under a false name or Social Security number during the 2003–2004 lockout, the employee's true name and Social Security number, the false name and Social Security number, the dates employed under a false identity, the positions in which the employee worked during the lockout, the employee's straight-time rates of pay during the lockout, and the store numbers at which such employment took place.

A description of all documents provided in response to the Kasper letters that relate to work by employees under false identities or employee refusals to work under false identities, complete photocopies of such documents, or a written proposal denoting a specific time and place for the inspection and copying of such documents.

The names and titles of all Ralphs' employees or representatives who communicated in writing with bargaining unit members concerning the information requested in the Kasper letters, the dates of all such communications, and if such communications were written, a description of the documents in detail, as well as complete photocopies, or a written proposal denoting a specific time and place for the inspection and copying of such documents.

A complete copy of the Respondent's internal investigation and/or audit with all attachments that are not shielded under the attorney-client or attorney work-product privileges, of work performed by employees during the 2003–2004 lockout, under either false identities or their own names, as well as of Ralphs' employment of Albertsons and Vons employees during the lockout. If the investigation is still ongoing, a complete copy of all existing drafts, attachments, and evidence used in conducting and/or preparing the investigation excepting those shielded under the attorney-client or attorney work-product privileges, or a written proposal delineating a specific time and place for the inspection and copying of such documents. As to items that may be found privileged, a complete summary of the investigation and factual findings.

4. The Respondent's unlawful conduct described in paragraph 3 above affects commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that Respondent has engaged in certain unfair labor practices, it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]